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NOTES

CONSTITUTIONAL PROBLEMS RAISED BY THE LEVER ACT.—The anomalous legal situation which existed for some time in Pennsylvania, due to the fact that while in the eastern section of the State prosecutions against alleged profiteers under the Lever Act[1] had been enjoined by order of court,[2] yet in the western section their validity had been recognized,[3] is but indicative of the situation throughout the country. The activity of the Attorney General in waging a campaign against overcharging for necessaries has brought the question squarely before the courts in the different circuits, with the result that there is now pending before the Supreme Court the final determination of the constitutionality of the Act in general, and of specific provisions in particular.

[1] Act Aug. 10, 1917, c. 53, 40 Stat. 276, as amended Oct. 22, 1919, c. 80, 41 Stat. 297.

[2] Lamborn v. McAvoy, 265 Fed. 944 (1920).

[3] United States v. Rosenblum, 264 Fed. 578 (1920). In an unreported decision Oct. 21, 1920, this court also declared the Act unconstitutional in part.

The authority of Congress to pass such a measure has been uniformly acknowledged by the lower Federal courts; it is only in construing Section 4 of the Act that the courts have shown marked differences of opinion. Prosecutions for alleged profiteering have been brought under the provisions of this section which makes it unlawful "for any person to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries." The pleadings to indictments have disclosed for the most part a common basis of defense, viz.: (1) A food control Act, such as this Act purports to be, is unconstitutional in that it violates the Fifth Amendment in lacking due process, and the Tenth Amendment in not being a fit subject of Federal legislation; (2) Section 4 of the Act is void for the reason that it does not state with sufficient definiteness the conduct prohibited, and furthermore it contains an arbitrary classification exempting farmers, gardners, etc., from the effect of its provisions; (3) Section 4 of the Act, made effective by Amendment in October, 1919,[4] cannot be considered as a war measure nor of continuing force at the present time.

The lower courts have had little difficulty in concluding that Congress in the exercise of its war powers[5] might regulate the price and distribution of necessaries as defined in the Act,[6] even though such regulation concerns transactions which are distinctly intra-state in character. The attitude of the courts in one sense is a striking one.[7] It has been a fundamental principle of our law that a man may ask for his wares or services whatever price he is able to get and others are willing to pay, and that no one can compel him to take less, although the price may be so exorbitant as to be extortionate.[8] The common law has not had the notion—so familiar on the Continent of Europe—of the nation in its collective and corporate sense, entrusted with broad powers for subordinating the individual rights of property holders to a general good and vitally interested in the cost of commodities.[9]

[4] Section 4 as originally enacted conta ned no penalty provision, and for this reason was declared inoperative. United States v. Mossew, 261 Fed. 999 (1919), aff. 266 Fed. 18 (1920).

[5] Article 1, Sec. 8, Clauses 1, 11, 12, 13, 14, 15, 16, 18.

[6] Sec. 1, as amended Oct. 22, 1919, c. 80, 41 Stat. 297.

[7] See "War-time Legislation—1917" by Judge Hough, 31 Harvard L. R. 692.

[8] Tiedeman "State and Federal Control of Persons and Property" (2nd Ed.) Sec. 96. This broad proposition has heretofore been modified by the courts in two sets of circumstances: (1) where a business is carried on by or in connection with some franchise or privilege from the State (Cooley, "Principles of Constitution," p. 234); (2) where services have become affected with a "public interest" through monopoly or otherwise for which see Munn v. Illinois, 94 U. S. 113 (1876); Brass v. North Dakota, 153 U. S. 391 (1894); and the extension of the principle in German Alliance Ins. Co. v. Kansas, 233 U. S. 389 (1914).

[9] The notable exceptions to this proposition are the early Assize of Bread and Ale (Time Uncertain) and the Statute of Laborers, 23 Ed. III, c. 6 (1349). The wording of the latter in part is identical with the Lever Act. It forbade victuallers from charging more than a "reasonable price, having respect to the price that such victual be sold at places adjoining, so that the same sellers shall have moderate gains, and not excessive."

It is to be noted that this Act, reaching down as it does to compel obedience by the corner grocery man when he sells a pound of sugar, has been held valid by the courts, without calling upon theory or citations to strengthen their opinions. The courts have sensed the legislation to be proper, and, as stated in United States v. Oglesby Grocery Company,[10] have proceeded on the broad principle that "the powers of Congress in time of war are comparable to the police powers of the States in time of peace, and equally incapable of express limitations."[11]

While no legislation in the past exists as a precedent for the Act under consideration, yet the power of Congress to pass such a measure will undoubtedly be recognized by the Supreme Court, as a means "necessary and proper" for the effective exercise of the war powers. The measures open to Congress in carrying on war are not definitely limited by the Constitution. The war powers are not limited to victories in the field, but according to the court in Stewart v. Kahn[12] carry with them "inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress." The delegation of a power to the Federal Government carries with it the implied power to employ all means, not prohibited, which are reasonably conducive to the attainment of the legitimate end.[13] That the successful waging of the recent war was dependent as much upon centralized economic control as upon the raising of armies seems to admit of no doubt. To argue that the power does not exist to husband and make more equitable the distribution of necessaries at a time when necessaries might be put beyond the reach of a large body of the people, would be to deny the right of waging an effective war under modern industrial conditions.[14] If then the control of food and necessaries, including the regulation of prices, is a power necessary and proper for the carrying on of war, the fact that the regulation extends to transactions within the boundaries of the several States is immaterial. State boundaries are no barrier to the operation of a Federal law passed under authority vested in Congress.

[10] 264 Fed. 692 (1920).

[11] Weed v. Lockwood, 264 Fed. 453 (1920) aff. C. C. A. 2d Cir. 1920 (semble). "Food and wearing apparel control during a war emergency are properly the subject for war legislation and by limiting charges for such necessaries, Congress does not take property without due process of law; (semble) United States v. Swedlow, 264 Fed. 1016 (1920): "The act is one of many passed by Congress solely for war purposes, and valid only because it was an exercise of the war power"; (semble) United States v. Cohen Grocery Co., 264 Fed. 218 (1920): "It is, of course, fundamental that the constitutionality of the Act depends upon whether at the time it was passed and approved there existed a state of war."

[12] 11 Wall. 493 (1870).

[13] McCulloch v. Maryland, 4 Wheat. 316 (1819).

[14] See foreign "Government Regulation of Prices During the War"—Cong. Rec. 65th Cong., I Sess., June 18, 1917, p. 3779.

The power of food control being inherent in the war power, it is yet to be determined whether its exercise in the regulation of prices is in violation of the Fifth Amendment with its provision that no person shall be deprived of property without due process of law. The Act in regulating prices of commodities does not provide for compensation in return. The right to property includes the right to dispose of it for a price. Does a law restricting this price to a reasonable charge lack due process? The question may be viewed from two angles: first, how does the Fifth Amendment limit Congress in the exercise of any of its powers? Second, what limitation is to be opposed to the war power?

The principle that the limitations placed upon Congress by the Fifth Amendment are no greater than those placed upon the States, in the exercise of their police powers, by the Fourteenth Amendment, has received authoritative declaration.[15] It is submitted that, following the principle announced in Munn v. Illinois[16] and subsequent cases,[17] whenever staple articles recognized as necessaries become clothed with a "public interest" in that their price and distribution vitally affect public welfare, the State in the exercise of the police power may regulate the price to be charged therefor, as well as the method of distribution.[18] Viewing the war power of Congress in the same light as any other power, it would follow that, since under Munn v. Illinois and similar cases the State would be justified in calling the price and distribution of food as a matter of public concern if it were faced with a situation calling for such action, and since this action could be taken in the face of the Fourteenth Amendment, Congress could likewise, in a lawful sphere of power, enact the present Act without contravening the rights set up by the Fifth Amendment.[19]

A fortiori, it follows that Congress when exercising a war power is not limited in the present case by the Fifth Amendment. It is true that the war powers are subject to "applicable Constitu-

[15] *In re* Kemmler, 136 U. S. 436, 448 (1889); Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 156 (1920).

[16] 94 U. S. 113 (1876).

[17] People v. Budd, 143 U. S. 517 (1891); Brass v. North Dakota, 153 U. S. 391 (1894); Insurance Co. v. Kansas, 233 U. S. 389 (1914).

[18] Weed v. Lockwood, 264 Fed. 453 (1920); Opinion of the Justices, 182 Mass. 605 (1904).

[19] In this connection it is to be noted that Mr. Justice Brandeis, speaking for the court in Hamilton v. Kentucky Distilleries Co., *supra*, declares that "if the nature and condition of a restriction upon the use or disposition of property is such that a State could, under the police power, impose consistently with the Fourteenth Amendment without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the Fifth Amendment, without making compensation." By taking this test as an ultimate one, rather than as a convenient one, the court in United States v. Spokane Dry Goods Co., 264 Fed. 209 (1920) found some difficulty in justifying a food control act, whereas the court in Weed v. Lockwood, *supra*, taking the test as given, found a price fixing power in the State under Munn v. Illinois, *supra*.

tional limitations," and that the Constitution limits Congress in war as well as in peace.[20] In taking their stand on the due process provision of the Fifth Amendment, those who urge that the economic control given by the Act is unconstitutional are asserting an extreme individualism as opposed to the impulse of self-preservation. According to Willoughby "the power to wage war carries with it the authority to override in many particulars rights which in time of peace are inviolable."[21] Rights and liabilities under the common law are not static, but are in a state of growth and adaptation, so that a historical survey of the meaning of due process is not to be taken as the last word on the subject. The guarantee of the Fifth Amendment is secured if the laws operate on all alike, without subjecting the individual to an arbitrary exercise of power.[22] Considering the purpose of the Act and the times which called it forth, there is little likelihood that the Supreme Court will find the power exerted by Congress through the President to be arbitrary or subversive of the general principles which govern society.

The contention that Section 4 of the Act is void in that it does not state what is an unjust or unreasonable rate or charge, and due to the fact that it contains an arbitrary exemption clause, is undoubtedly the proposition upon which those questioning the validity of the prosecutions instituted under it are making their strongest stand.[23] The argument has caused the courts in four well considered cases to declare the Section unconstitutional.[24] On the other hand, seven courts while recognizing the force of the argument have refused to accede to it, and have upheld the validity of the Section.[25]

[20] *Ex parte* Milligan, 4 Wall. 2, 121, 127 (1866); United States v. Kress, 243 U. S. 316, 326 (1916); Hamilton v. Kentucky Distilleries Co., *supra*.

[21] Willoughby "Constitutional Law," Vol. 2, Sec. 715.

[22] Missouri Pacific Railway Co. v. Humes, 115 U. S. 512, 519 (1885); Giozza v. Tiernan, 148 U. S. 657 (1892).

[23] Section 4 as amended reads in part as follows: "It is hereby made unlawful for any person to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire to exact excessive prices for any necessaries. Provided, that this section shall not apply to any farmer, gardner, or other agriculturist with respect to the farm products produced or raised upon land owned, leased or cultivated by him; provided further, that nothing in this Act shall be construed to make unlawful collective bargaining by association of farmers with respect to the farm products," etc.

[24] Creamery Company v. Kinnane, 264 Fed. 845 (1920); United States v. Cohen Grocery Co., 264 Fed. 218 (1920); United States v. Armstrong, 265 Fed. 683 (1920); Lamborn v. McAvoy, 265 Fed. 944 (1920).

[25] Weed v. Lockwood, 264 Fed. 453 (1920) aff. C. C. A. (1920); United States v. Swedlow, 264 Fed. 1016 (1920); United States v. Myatt, 264 Fed. 442 (1920); United States v. Rosenblum, 264 Fed. 578 (1920); United States v. Oglesby Grocery Co., 264 Fed. 691 (1920); United States v. Merritt, 264 Fed. 871 (1920); United States v. Russel, 265 Fed. 714 (1920). In United States v. American Woolen Co., 265 Fed. 404 (1920) the court held woolen cloth not to be a necessary within the act; in United States v. Robinson, 266 Fed. 240 (1920) an indictment drawn in the general terms of the Section was held to be defective.

It is admitted that criminal statutes ought "to be plainly and clearly, and not cunningly and darkly penned." No criminal statute can be sustained unless its mandates are clearly expressed so that an ordinary person can know in advance how to regulate his conduct to conform therewith.[26] If the mandates are not set down with sufficient definiteness the statute is void as lacking due process and is violative of the Sixth Amendment which guarantees that the accused shall enjoy the right to be informed of the nature and cause of the accusation, and the accompanying right that a criminal act must have previously been defined. The Section in making unlawful the exaction of an "unjust or unreasonable rate or charge" is to stand or fall with these words.[27] That it presents a difficult problem in some aspects to a dealer in necessaries is patent. According to the court in Lamborn v. McAvoy, *supra*, "the Statute leaves it uncertain whether a man may lawfully base the price of his commodity upon a profit over the original price, whether he may make a price based on general market conditions, whether his selling price may be based upon the cost he would have to incur to replace the merchandise, and in general the jury may speculate as to any line of conduct, whether it would or would not justify a rate or charge, in determining whether it was unjust or unreasonable." The cataloguing of these difficulties confronting the merchant, however, should not disguise the fact that the single question is, admitting all these difficulties, did John Doe in buying a commodity for $1.00 and in selling it for $1.50 make an unjust or unreasonable charge under the circumstances? The difficulty of proving that John Doe did such a thing likewise should not affect the validity of the section. Its validity depends upon whether the law can compel a man so to regulate his conduct in the matter that it shall appear reasonable to the jury. It is submitted that the law can do this very thing.

An examination of the lower courts' decisions on Section 4 brings out the fact that the validity of the section depends upon whether a broad rule announced in Tozer v. United States[28] has found support in the adjudications of the Supreme Court. That case held a statute prohibiting "undue preference" in railroad

[26] United States v. Brewer, 139 U. S. 278, 288 (1891); International Harvester Co. v. Kentucky, 234 U. S. 216 (1913); United States v. Capital Traction Co., 34 App. D. C. 592 (1910); Hewitt v. State Examiners, 148 Cal. 590 (1906).

[27] Under provisions of Sec. 2 of the Lever Act, authorizing the President to employ any means to carry out the purpose of the Act, the President under Executive Order dated Aug. 10, 1917, created the United States Food Administration; further, in accordance with Sec. 5, the President by Proclamation dated Oct. 8, 1917, 40 Stat. II, p. 1700, instituted a licensing system for the necessaries named in the proclamation; by Proclamation dated Nov. 21, 1919, the powers of the Food Administration were transferred to the Attorney General, Stat. 66th Cong., I Sess., p. 34 Proc. It does not appear that prices of necessaries were fixed in various localities, as far as the brokerage or retail trade was concerned.

[28] 52 Fed. 917 (1892).

rates void for uncertainty. The rule was announced that "the criminality of an act cannot be made to depend upon whether a jury might think it reasonable or unreasonable." If the rule as stated is correct, Section 4 cannot be sustained. It is submitted that the rule has not been recognized by the Supreme Court, but on the contrary has been disapproved, if not flatly overthrown, by the "rule of reason" announced by the court in the interpreation of the Sherman Act.[29] In applying this rule of reason to a criminal prosecution instituted under the Sherman Act, the court in Nash v. United States[30] upheld an indictment charging an "unreasonable restraint of trade." The fact that no standard of reasonableness was set by the statute did not invalidate it. This case was followed by International Harvester Company v. Kentucky[30a] in which a criminal statute making unlawful the enhancing or depreciating the price of a commodity either above or below its "real value" was declared invalid. The case was distinguished from the Nash case supra, and in its opinion the court states clearly the reason for the distinction. It pointed out that the statute in Nash v. United States in requiring men to estimate a matter of degree at their peril "dealt with an actual, not with an imaginary condition other than the facts," whereas in the case under review the statute concerned itself with "real value" where the elements necessary to determine this imaginary ideal were "both uncertain in nature and degree of effect to the acutest commercial mind." In short, the statute prohibiting an unreasonable restraint of trade dealt with a situation which was concrete, and known or capable of being known to the ordinary person, and was therefore valid even though it required a man at his peril to estimate a matter of degree.[31] Applying the court's own distinction to Section 4 of the Lever Act, it would appear to be decisive of its validity. Section 4 concerns itself with an actual concrete problem, not an imaginary condition; it deals with the factum of bargain and sale under actual surrounding conditions as they exist in different localities and at different times; it calls upon the merchant to judge of the fairness of his practice.

[29] Standard Oil Co. v. United States, 221 U. S. 1 (1910); American Tobacco Co. v. United States, 221 U. S. 106 (1910); both cases interpreting Sherman Act, c. 647, 26 Stat. 209.

[30] 229 U. S. 376 (1912). Mr. Justice Holmes, in giving the decision, said in part: "But apart from the common law as to restraint of trade thus taken up by the Statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it somematter of degree. If his judgment is wrong, not only may he incur a fine—he may incur the penalty of death." (semble) Miller v. Strahl, 239 U. S. 426 (1915) where a statute requiring a hotel-keeper to do "all in his power" to save guests in case of fire was held valid.

[30a] 234 U. S. 216 (1913).

[31] See Waters-Pierce Oil Co. v. Texas, 212 U. S. 86 (1909), where a statute was upheld prohibiting contracts "reasonably calculated" to fix or regulate prices.

Irrespective of the authority of Nash v. United States, it is to be noted that the idea of reasonableness is not unknown to the criminal law. As stated by Mr. Justice Holmes, "there are cases in which the criminal law requires a man to know facts at his peril. Indeed, the criterion which is thought to be free from constitutional objection, the criterion of fault, is the application of an external standard, the conduct of a prudent man in the known circumstances, that is, in doubtful cases, the opinion of the jury, which the defendant has to satisfy at his peril and which he may miss after giving the matter his best thought."[32] It is no more without due process to require a man to know what is a reasonable charge or rate than to require him to know what is unfair competition in trade, what constitutes using the mails to defraud, what is the line between criminal negligence and the act of a prudent man, or what conduct would justify him as a reasonable man in killing another. Courts should give practical construction to statutes if possible. Section 4 may be construed to forbid, in time of war, any departure from the usual ratio of charges and profits which obtained in peace times, and which are not justified by special surrounding circumstances. The validity of the Section on this point should be upheld.[33]

The further objection will be raised that Section 4 is rendered invalid by the provision that it shall not apply to "any farmer, gardner, horticulturist or other agriculturist with respect to the farm products produced or raised upon land owned, leased or cultivated by him." Due process within the meaning of the Fifth Amendment is secured if the laws operate on all alike; purely arbitrary enactments directed against individuals or classes are held not to be "the law of the land" or to conform to due process.[34] Arbitrary classification of particular individuals or groups, exempting them from duties or privileges, amounts to a denial of due process.[35] Mere inequality before the law is not to be the test of the validity of the classification, since classification presupposes inequality. The test is whether the power of classification has been arbitrarily employed. It is a broad power and its exercise is not to be stricken down unless it is arbitrary beyond a doubt.[36]

In urging the arbitrary character of the classification contained in Section 4 the case of Connolly v. The Pipe Company[37] will be cogent authority. There the Anti-Trust Statute of Illinois

[32] Employers' Liability Cases, 250 U. S. 400, 432 (1918).

[33] The courts in Lamborn v. McAvoy, *supra*, and United States v. Cohen Grocery Co., *supra*, distinguish Nash v. United States, *supra*, and refuse to follow it in the present instance on the ground that the Statute in that case simply defined a common law crime. It is submitted that such a distinction is not justified by the decision or its later interpretation.

[34] McGehee Due Process of Law, p. 60.

[35] Willoughby Constitutional Law, p. 873, 874.

[36] International Harvester Co. v. Missouri, *supra;* Royster Guano Co. v. Virginia, U. S. Sup. Ct. Advanced Opinions 1919–20, p. 658.

[37] 184 U. S. 540 (1901).

prohibiting combinations to raise prices in commodities was held invalid due to a clause exempting from its provisions "agricultural products or live stock while in the hands of the producer or raiser." If the present measure were a peace time measure it is difficult to see how the present exemption of farmers could be upheld, in view of this decision. As a war measure the exemption of the farmer from its provisions may reasonably be said to be conducive of increased production of food necessaries. The exemption did not do away with the liability of the farmer organizations to the Anti-Trust Acts, and was limited in effect to the products of their own lands. The wisdom of the exemption may be condemned from the standpoint of political policy but that is not a problem for the court. Since there is a fair basis for the classification under the pressing circumstances, the statute should not be declared invalid because of the exemption clause [38]

The objection that Section 4, amended and made effective October 22, 1919, eleven months after the armistice with the enemy powers, was not a war measure, will undoubtedly be disposed of by the Supreme Court on the basis of the decision[39] upholding the validity of the Volstead Act[40] passed October 28, 1919, as a war measure.[41]

How will the court look upon this legislation when the same question is brought before it approximately one year later, when most, if not all, war activities and agencies have been discontinued? The time limited in the Act when it should become inoperative has not arrived,[42] since peace has not been made with the enemy powers. The silence of the President and Congress on the subject of the law's repeal should be determinative for the Court that in the judgment of the executive and legislative branches a necessity still exists for its continued validity.

The opinion of the Supreme Court is awaited with increasing interest not simply for its effect on the contemplated prosecutions against the coal miners and operators, but from the standpoint of the court's dealing with war powers under modern conditions.

J. R. Jr.

[38] American Sugar Refining Co. v. Louisiana, 179 U. S. 89, in which a license tax placed on the business of sugar refining exempting from its provisions planters and growers who refined their own sugar was upheld; International Harvester Company v. Missouri, *supra*, in which the State Anti-Trust Statute exempting the vendors of labor or services from its provisions was upheld.

[39] Ruppert v. Caffey, 251 U. S. 264 (1920).

[40] C. 83, Stat. 66th Cong., I Sess. 1919.

[41] The dissenting opinion *inter alia* in declaring the Volstead Act invalid expressed the belief that no war necessity existed to justify the legislation. "The powers of Congress should be restricted to actual necessities consequent upon war."

[42] Sec. 24. "The provisions of this Act shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such determination shall be ascertained and proclaimed by the President."